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Conclusion

The reversal of *Crown Cafeteria* and the holding in the *Getreu* case seem to better reflect the legislative history and the plain meaning of the section. Furthermore, these two decisions seem to obviate the constitutional problems and avoid making the proviso a nullity. Proviso two still appears to present formidable problems. But once the present interpretation becomes instilled in labor relations it should not be lightly overturned. Both management and labor should know within what bounds they can operate legally. The present Board's interpretation better effectuates the policy of the Act than did the prior interpretation and should be the one to ultimately be declared law, either by clarification by Congress or the Supreme Court.



THE CONTRACT PROPOSALS TO THE SECOND RESTATEMENT,
CONFLICT OF LAWS: A COMPARATIVE ANALYSIS

Almost every author who undertakes a discussion of the contracts area of the conflict of laws feels that he must preface his remarks with some indication of the uncertainty and confusion surrounding his topic.¹ Perhaps the most basic reason for the confusion can be traced to differences of opinion as to the very philosophies which form the foundation of our legal system.² But a somewhat more mundane explanation may be found in the fact that theorists attempted to lay down one or two simple and apparently precise rules to govern this wide and complex subject, while the courts, even when openly espousing these rules, refused to be controlled by them.³ However, it is only fair to point out that even before the American courts were confronted with any "precise rules,"⁴ one would often find contradictory—or at

Board election. Thus, if the picketing protected by proviso two continues after such expedited election the picketing will not be an unfair labor practice under 8(b)(7)(B) and will continue to be protected by that proviso.

¹ See, e.g., Beale, *What Law Governs the Validity of a Contract* (I), 23 HARV. L. REV. 1 (1909); Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959); Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1921).

² See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 3-47 (1942).

³ See RESTATEMENT (SECOND), *CONFLICT OF LAWS*, Introductory Note, at 2 (Tent. Draft No. 6, 1960).

⁴ See RESTATEMENT, *CONFLICT OF LAWS* § 332 (1934).

best confusing⁵—legal terms and concepts used in controversies involving contracts with “contacts” in several states.

To give a concrete illustration, the New York case of *Wilson v. Lewiston Mill Co.*,⁶ decided in 1896, may be profitably examined. The plaintiff brought his action to recover damages for an alleged breach of a contract, but the court first had to decide which state was to supply the laws to govern the contract. The court indicated that the intention of the parties was to control; however, “intent” is a term which is difficult to define, and, to discover the intent of two people when they have not expressly indicated it, is even a more difficult task. Weighing such factors as *lex loci solutionis* and *lex loci contractus*—factors which can be as evasive today as they were then—the court concluded that the parties “contemplated” that the laws of Maine were to be applied to their contract. Since the agreement failed to satisfy the Maine Statute of Frauds, the plaintiff was denied recovery.

The federalist make-up of the United States provided a fertile ground for both the growth of conflict of laws principles and the ambiguities which surrounded the intrinsic⁷ validity of multi-state contracts. For, pulling in almost opposite directions was the factor of the numerous territories or states promulgating their own separate laws and the omnipresent desire to maintain some semblance of uniformity and harmony of law throughout the country. This striving for uniformity, especially in the area of contract validity, has most recently found fruition in the contracts proposals of the *Second Restatement of the Conflict of Laws*. That the new proposals are so diametrically opposed to the *First Restatement*, which was adopted in 1934, is living proof of the turbulent growth and fluctuation of theory that has gripped our country for the past several decades.⁸ The basic sections of the

⁵ Professor Joseph Beale once commented that “almost every rule ever suggested for determining the law applicable to the validity of a contract . . . has . . . been adopted by the Supreme Court of the United States as the basis of its decision; that each decision has been made apparently without realizing its inconsistency with former decisions; and that many of the decisions are self-contradictory.” Beale, *What Law Governs the Validity of a Contract* (II), 23 HARV. L. REV. 79, 84-85 (1909). But see Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893 (1942) for a criticism of Beale’s analysis of American conflict cases involving contracts.

⁶ 150 N.Y. 314, 44 N.E. 959 (1896).

⁷ Intrinsic or essential validity is distinguished at the outset from mere formal validity which concerns itself with the form required for contracting. This note will be more directly concerned with intrinsic validity. See Beale, *supra* note 1, at 3; Lorenzen, *supra* note 1, at 565.

⁸ The American system of conflicts law which was so competently initiated by Joseph Story remained fairly inactive for almost a century. Following the appearance of the *Restatement* in 1934, great controversy arose and interest was stimulated. Yntema, *Contract and Conflict of Laws*:

new rules provide, subject to some qualifications, that the parties can choose the law governing their contract; the rules also describe the approach that should be taken by the courts to ascertain the governing law in the absence of an effective choice.⁹ In order to acquire a better perspective of the new *Restatement*, it would be profitable, if not necessary, to journey back through the maze of decisions, theories, and writings before going more deeply into its specific details.

The starting point of any itinerary through the area of conflicts and contracts would logically—though not chronologically¹⁰—have to be Professor Joseph Beale. He was the reporter, and person most responsible for the first *Restatement* which appeared in 1934. However, long before that time, Professor Beale's theories on conflict rules in general, and contract validity in particular, were influencing courts and textwriters throughout the land.¹¹

Underlying any particular rules which he laid down to guide courts in their contract disputes, was his basic theory of vested rights or territorial sovereignty.¹² He felt that the mere agreement of two parties to do something could not create any legally binding obligation to do it; it was only when the law affixed a legal obligation to the promise that the parties entered into a contract. Therefore, the question whether a particular contract was valid could be determined only by the law which applied to the acts, that is, by the law of the place of contracting. If the law of that place annexed an obligation to the acts of the parties, the promisee had a legal right which no other law had power to take away except as a result of new laws which changed it,¹³ *i. e.*, the legal right was *vested* because the sovereign territory, not the parties, gave efficacy to the acts.¹⁴

"Autonomy" in Choice of Law in the United States, 1 N.Y.L.F. 46, 65 (1955).

⁹ RESTATEMENT (SECOND), *supra* note 3, § 332, comment b.

¹⁰ Joseph Story is the acknowledged father of American conflicts law, but it was Beale, as reporter for the 1934 *Restatement*, who awakened America from its conflict of laws lethargy. He is the focal point of most of the writings on conflicts and contracts that have appeared over the last thirty years.

¹¹ See, *e.g.*, GOODRICH, *CONFLICT OF LAWS* 316-23 (3d ed. 1949); Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565, 656-63 (1921).

¹² COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 347-51 (1942).

¹³ Beale, *What Law Governs the Validity of a Contract* (III), 23 HARV. L. REV. 260, 270-71 (1910).

¹⁴ As Judge Learned Hand declared: "But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than

Thus equipped theoretically, Beale, in 1910, gathered cases from all jurisdictions of the country to find out just how the courts were handling the problem of the validity of contracts when the controversy was presented in a conflict of laws setting. From his readings he formulated three basic rules which seemed to prevail: (1) the rule which permitted the intention of the parties to fix the law to govern the contract; (2) that which held that the place of performance governed the obligation; and, (3) that which advocated that the place of the making of the contract should fix the obligation of the parties.¹⁵ With the cases thus examined, he commenced his famous theoretical and practical analysis of the three rules.

It is submitted at the outset, that to better understand Beale's criticism of the first rule, *i. e.*, that intent of the parties be allowed to govern the obligation, it is necessary to separate the idea of intent into two categories: express and implied,¹⁶ although it does not appear that Beale himself made such a dissection. His basic theoretical objection to permitting the parties to *expressly* select the governing law was that it would enable the parties to perform a legislative act.¹⁷ To permit the parties to adopt any foreign law to govern their act was allowing them to free themselves from the power of the law which would otherwise apply to their acts; and to give two persons this power was certainly anomalous.¹⁸

His main practical objection was directed toward the aspect of *implied* intent—where, finding no express language, the court had to search for circumstances to determine what law the parties wanted to govern their contract. Beale felt that the intention was found in such cases only *after* a controversy. The duty of law in general, and lawyers in particular, was to avoid litigation; and yet, it was not until a dispute had been submitted to a court that an attorney could advise his client as to what law was to govern his contract.¹⁹

The second main rule, the law of performance, met the same basic objections. First, it permitted the parties to substitute some other law for the law under which they originally purported to act.²⁰ If the place where the parties acted refused legal validity to their acts, it was "impossible to see on what principle some other

with whether their acts are torts or crimes." *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931).

¹⁵ Beale, *supra* note 13, at 260.

¹⁶ Cf. Cook, *op. cit. supra* note 12, at 390.

¹⁷ Beale, *supra* note 13, at 260. See also, GOODRICH, *op. cit. supra* note 11, at 326.

¹⁸ Beale, *supra* note 13, at 261.

¹⁹ Beale, *supra* note 13, at 264.

²⁰ Beale, *supra* note 13, at 267.

law may nevertheless give their acts validity."²¹ Therefore, any attempt to make the law of the place of performance govern the act of contracting was an attempt to give extraterritorial effect to that law.²² Similarly, from the practical standpoint, a lawyer in a state where the contract was made could not be an expert in the law of the place where performance was to occur. Thus, he was in no position to advise his client as to that law while in the process of drawing up the contract.²³

The rule that the place of making was to govern, however, had none of these objections. There was "no doubt" that this rule was "theoretically sound." Beale found that even judges who laid down different rules noted that this was the "natural one." In essence, the question whether a contract was valid, *i. e.*, whether the law annexed any obligation to perform to the agreement, could be determined by no other law than that which applied to the acts, the law of the place of contracting.²⁴ Then too, this *lex loci contractus* presented none of the practical failings of the other two rules: first, there was no uncertainty in its application; secondly, the law of the place of making was the simplest to follow, and even if the place of making was fortuitous, the parties could consult local counsel.²⁵ When the *Restatement of the Conflict of Laws* appeared in 1934, it was this "logical and theoretically sound" rule which formed the basic section in the contract area.²⁶

With this brief sketch of Professor Beale's ideas and works serving as a springboard as it were, it is possible to move more deeply into the "confusion" surrounding the validity of multi-state contracts. Beale's fundamental theory of territorialism was espoused earlier by the first great American scholar in the conflicts area, Joseph Story. In his famous treatise we find the principle, later adopted by Beale, that "the laws of every state, affect and bind directly . . . all contracts made and acts done within it."²⁷ Story

²¹ *Ibid.*

²² *Ibid.* That the laws of one state could not have inherent extraterritorial effect was the necessary result of the independence of distinct sovereigns. However, they might indirectly be given effect in other jurisdictions by reason of courtesy or comity. See STORY, *CONFLICT OF LAWS* § 278 (3d ed. 1846).

²³ Beale, *What Law Governs the Validity of a Contract* (III), 23 HARV. L. REV. 260, 270 (1910).

²⁴ *Id.* at 270-71. The place in which the *final act* was done which made the promise or promises binding was the "place of contracting." 2 BEALE, *CONFLICT OF LAWS* § 311.1 (1935).

²⁵ Beale, *supra* note 23, at 271.

²⁶ RESTATEMENT, *CONFLICT OF LAWS* § 332 (1934). All matters dealing with capacity, form of the promise, consideration, etc., were determined by the law of the place of contracting.

²⁷ STORY, *op. cit. supra* note 22, § 18; see Beale, *supra* note 23, at 267.

felt that every person contracting in a country was understood to submit himself to its law, and silently assent to its action upon his contract. The law of the place of the contract acted upon it, *independently of any volition of the parties*, by virtue of the general sovereignty, possessed by every nation, to regulate all persons, property and transactions within its own territory.²⁸ However, it took no more than a rather common type of contract, one made in one place and to be performed in another, to bring about a split in the thinking of these two "territorialists." Thus, while Beale stayed consistently with his fundamental theory that the *lex loci contractus* governed validity,²⁹ Story indicated that there was a different general rule when the contract was to be performed in a place other than where it was made. In such a case, the "presumed intent" of the parties dictated that the contract as to its validity, as well as to its nature, obligation and interpretation, was to be governed by the law of the place of performance (*lex loci solutionis*).³⁰

The mention of presumed intent here seems illogical to say the least. For it is said that the law of the place of the contract acts independently of any volition of the parties; and at the same time, that "natural justice"³¹ demands that the place of performance must govern because that is the place "presumably intended" by the parties. Yet it does illustrate the ambiguity which has always surrounded the basic terms in this area of the law. Story himself furnishes another example when he says that the term *lex loci contractus* "may have a double meaning or aspect; and, that it may indifferently indicate the place, where the contract is actually made, or that, where it is virtually made according to the intent of the parties. . . ." ³² The uncertainty of wording, of course, added to the confusion³³ and made it difficult to categorize men or jurisdictions as to their views. For example, Story himself could properly fit into any of the three general rules which Beale set out: he basically held that the place of performance was to govern

²⁸ STORY, *op. cit. supra* note 22, § 261.

²⁹ See Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 661 (1921). However, the law of the place of performance did govern matters dealing with the sufficiency of performance or excuse for nonperformance. RESTATEMENT, *supra* note 26, § 358. Professor Cook felt that designating the law of the place of performance as governing nonperformance was an illogical application of the vested right theory. For there were no "acts" (nonperformance) upon which the place of performance could act. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 355-57 (1942).

³⁰ STORY, *op. cit. supra* note 22, § 280.

³¹ *Ibid.*

³² STORY, *CONFLICT OF LAWS* § 299 (3d ed. 1846).

³³ See Beale, *What Law Governs the Validity of a Contract* (I), 23 HARV. L. REV. 1, 2 (1909).

validity, but this was because of the presumed intent of the parties; and yet, when performance and making took place in the same place, then the place of making (*lex loci contractus*) was to govern.

A more concrete example of the virtual impossibility of "categorizing" is furnished by the famous Supreme Court case of *Pritchard v. Norton*,³⁴ in 1882. In that case, the defendant Norton had executed and delivered to the plaintiff's testator in New York, an indemnity bond whereby the testator was to be indemnified against all losses arising from his liability on an appeal bond which he had signed as surety. The bond covered litigation in the Louisiana courts, and it had been signed in Louisiana. The law of New York subjected the indemnity bond to impeachment for lack of consideration (pre-existing debt), but the law of Louisiana provided otherwise. Thus, the Supreme Court was presented with the question of which state's law was to govern the obligations of the parties. This was to be determined by finding the law which the parties incorporated into their contract. The Court held that the parties entered into the indemnity bond with a view to the law of Louisiana as the place for fulfillment. In later years this one case was alternately referred to as illustrating no less than four distinct views: the place of performance theory,³⁵ the rule of validation theory,³⁶ the proper law theory³⁷ and the intention theory.³⁸ However, as early as 1910, the tendency throughout the country was that the intent of the parties should govern.³⁹ The new *Restatement* has also adopted this rule, so perhaps an end to the "confusion" is near. In any event, it seems appropriate that attention now be turned to "intent."

It is stated that the basic premise of the law of contracts is "that the agreement of the parties, including their intention respecting the law to govern the agreement, should be given legal sanction, except as there are good reasons to the contrary."⁴⁰ However, as already stated, any attempt to permit the intent of the parties to select the governing law was attacked because it supposedly gave them the power to "legislate."⁴¹ Professor Beale

³⁴ 106 U.S. 124 (1882).

³⁵ Beale, *What Law Governs the Validity of a Contract* (II), 23 HARV. L. REV. 79, 83 (1909).

³⁶ Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 999 (1959).

³⁷ Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 919 (1942).

³⁸ See Lorenzen, *supra* note 29, at 670-72.

³⁹ See Beale, *What Law Governs the Validity of a Contract* (II), 23 HARV. L. REV. 194, 207 (1910).

⁴⁰ Yntema, *Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States*, 1 N.Y.L.F. 46, 65-66 (1955).

⁴¹ See text accompanying notes 17 and 18 *supra*.

noted that this was permitted on the Continent, where the doctrine was known as the principle of autonomy of the will, but any attempt to apply it to a common-law system such as ours was anomalous.⁴² Thus formed the first line of battle, as those who opposed Beale's views attacked his non-autonomy concept. At the outset, it was stressed that no one was advocating the idea that the parties could choose *any* law. There had to be some substantial connection between the contract and the place chosen.⁴³ With this in mind, the most famous exponent of expressed intent, Walter Wheeler Cook, took direct aim on the "legislative" objection of critics of the intention theory. First, he pointed out some eleven illustrations,⁴⁴ in other areas of the law, where the parties were permitted to "make law" for themselves by agreeing to alter the rights they would otherwise have under general rules of law. Cook's second argument was aimed at showing that a choice of law by the parties was not an act of legislation at all. When the parties stipulated that the law of some other state (or country) was to govern, they agreed that the rules of decision found in that part of the law of the foreign state in question, which is applicable to purely domestic transactions,⁴⁵ was to be applied to the factual situation confronting the forum. These rules of decision were merely incorporated as one term of the agreement, the result being comparable to the insertion of stipulations which "merely alter what would otherwise be the legal consequences of the agreement."⁴⁶

Even accepting the fact that the parties can legislate or choose for themselves what law will govern their contract, a more serious problem is encountered when their intent is not expressly indicated. This nebulous area of implied intent produces differences among intention proponents themselves. Some are concerned with the task

⁴² Beale, *What Law Governs the Validity of a Contract* (I), 23 HARV. L. REV. 1, 7 (1909).

⁴³ Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899, 902-03 (1938); see RESTATEMENT (SECOND), CONFLICT OF LAWS § 332(a), comment f, at 21 (Tent. Draft No. 6, 1960).

⁴⁴ Cook, *supra* note 43, at 902-06. Among the illustrations cited was the New York case of *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931), in which two parties agreed in New York that any differences arising from their contract, which was to be performed wholly within the United States, would be settled according to the arbitration law of England. A dispute arose and recovery was had against the defendant in England although he ignored all process and did not appear. The Court of Appeals held that the complaint based on the English arbitration award stated a cause of action.

⁴⁵ In other words, the parties were referring to the "local law" of the foreign state and not to its entire "law" which would include its conflict of laws principles. This avoids the whole problem of renvoi. *Accord*, RESTATEMENT (SECOND), *supra* note 43, § 332, comment e.

⁴⁶ Cook, *supra* note 43, at 907; see COOK, THE LOGICAL AND LEGAL BASES

of finding the "presumed intent"⁴⁷ of the parties, while others just as strongly urge abandoning this fictional search for presumed intent and advocate the application of certain formulae to arrive at the law which is to govern the contract.⁴⁸ However, this difference of opinion is merely superficial, for beneath the two views the same elements of contract law are being discussed and weighed.⁴⁹ The reasoning in both instances is the same—only the label attached to the conclusion is different.

Accordingly, when Professor Arthur Nussbaum took issue with Professor Beale's analysis and criticism of the American cases, he pointed out that in situations where the law governing the contract had not been expressly agreed upon, the courts were eager to infer from the surrounding circumstances an "implied" or "hypothetical" intent.⁵⁰ This critic felt the more general view to be:

[T]he law of the country, with which in the expressed or *presumed* intent of the parties the contract had its most important connection, shall govern, taking into account the various territorial contacts of the contract, such as the place of contract, place of performance, domicile of the parties, situs of the res, etc.⁵¹

This investigation into the territorial contacts was termed the "objective theory" of intent;⁵² and, under it, the courts would be applying what the English legalists refer to as the "proper law of the contract," or the law with which the contract is most closely connected.⁵³

Among those skeptical of the theory of presumed intent was Cook himself. He viewed it as a "cumbersome and misleading way of expressing a rule that the 'law' to be applied is that of the state with which the transaction on a whole has the most

OF THE CONFLICT OF LAWS 398-99 (1942); Yntema, *supra* note 40, at 59.

⁴⁷ See *Pritchard v. Norton*, 106 U.S. 124, 137-38 (1882). This case is heavily relied upon by Professor Ehrenzweig, who speaks of presumed intent with respect to his validation theory. Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 999 (1959); *accord*, *Jansson v. Swedish Am. Line*, 185 F.2d 212, 218-19 (1st Cir. 1950); Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 896 (1942).

⁴⁸ See COOK, *op. cit. supra* note 46, at 416-19; see also WESTLAKE, PRIVATE INTERNATIONAL LAW § 212 (5th ed. 1912).

⁴⁹ Cf. Nussbaum, *supra* note 47, at 905; see *Wilson v. Lewiston Mill Co.*, 150 N.Y. 314, 323, 44 N.E. 959, 961-62 (1896). Compare text accompanying note 51 *infra*, with text accompanying note 54 *infra*.

⁵⁰ Nussbaum, *supra* note 47, at 896.

⁵¹ Nussbaum, *supra* note 47, at 896 (emphasis added).

⁵² Nussbaum, *supra* note 47, at 897.

⁵³ *Ibid.*; see COOK, *op. cit. supra* note 46, at 416.

substantial or vital connection."⁵⁴ He, too, would make a search for the contacts⁵⁵ which a particular contract has with various states to find where the most substantial connection lies. And, whether this be a search for the "presumed intent" of the parties or for the "proper law of the contract" does not change the result reached.

New York courts have still another name to give to this search for the governing law when none is expressly referred to by the parties. They look for the "center of gravity" of a contract.⁵⁶ The center, or place where the most significant contacts are grouped, furnishes the law to be applied.⁵⁷

The case primarily cited in this regard is *Auten v. Auten*,⁵⁸ which involved a husband and wife, married in England, who entered into a separation agreement in New York in 1933. The agreement provided that the husband was to make monthly support payments for his wife and children, and also that neither party would start any action relating to their separation. The wife immediately returned to England and, about a year later, filed a petition for separation in an English court, but the action never proceeded to trial. In any event, the years passed and the wife brought suit in New York for an amount allegedly due under the agreement. Special Term, concluding that New York law was to be applied, granted the husband's motion for summary judgment dismissing the complaint.⁵⁹ The Appellate Division affirmed the order, but granted leave to amend the complaint so that the wife could show if any rights had accrued to her prior to the commencement of her English proceeding.⁶⁰ Both courts, applying New York law, held that the wife's action in England constituted a rescission and repudiation of the separation agreement. The Court of Appeals,

⁵⁴ Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899, 920 (1938); see COOK, *op. cit. supra* note 46, at 416.

⁵⁵ See text accompanying note 51 *supra*.

⁵⁶ *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99, 101 (1954); In the Matter of Estate of Bulova, 14 App. Div. 2d 249, 256-57 220 N.Y.S.2d 541, 547-48 (1st Dep't 1961); accord, *Zogg v. Penn Mut. Life Ins. Co.*, 276 F.2d 861 (2d Cir. 1960).

⁵⁷ Judge Fuld, speaking for the court in the *Auten* case, found the advantage of the grouping of contacts, or center of gravity, theory to lie in the fact that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context. . . . Moreover, by stressing the significant contacts, it enables the court, not only to reflect the relative interests of the several jurisdictions involved . . . but also to give effect to the probable intention of the parties. . . ."

Auten v. Auten, *supra* note 56, at 161, 124 N.E.2d at 102.

⁵⁸ 308 N.Y. 155, 124 N.E.2d 99 (1954).

⁵⁹ *Id.* at 159, 124 N.E.2d at 101.

⁶⁰ *Auten v. Auten*, 281 App. Div. 740, 117 N.Y.S.2d 881 (1st Dep't 1953).

however, resorted to a "grouping of contacts" approach and decided thereby that English law, not New York law, was to govern. Since an issue existed as to whether English courts treated the commencement of a separation action as a repudiation of an earlier agreement, the court held that summary judgment should not have been granted and so the judgments of the lower courts dismissing the complaint were reversed.⁶¹

One slight blemish to New York's otherwise complete adoption of this rule results from the fact that the courts occasionally seem to look upon grouping of contacts as a rationalization of a result already reached through the traditional conflict rules.⁶² Thus, in the case of *Rubin v. Irving Trust Co.*,⁶³ decided a year before the *Auten* case, the Court of Appeals was confronted with an attempt to enforce an oral agreement, made in Florida by a New York domiciliary, wherein a decedent had promised not to revoke his will. The oral agreement was valid in Florida, but was a violation of the New York Statute of Frauds. After carefully deciding that the contract was not enforceable, whether the statute was considered substantive or procedural, the court went on to say that "there is yet another approach to the problem which tends to dictate the same result . . . the 'center of gravity' theory of conflicts of laws. . . ." ⁶⁴

It should be noted that this rationalization is not peculiar to New York courts. Thus, in the Indiana case of *W. H. Barber Co. v. Hughes*,⁶⁵ a decision later cited in the *Auten* case, the court was confronted with an Illinois default judgment which had been taken pursuant to a cognovit provision in a negotiable instrument. Such a provision was void in Indiana but valid in Illinois. The court felt that Illinois law was to determine the validity of the note because the instrument was *executed* in Illinois, despite the fact that the note had been signed and mailed in Indiana. However, the court went on to say that "as a test of the correctness of our conclusion that the validity of the note . . . must be determined by the law of Illinois, we resort to a method (grouping of contacts) used by modern teachers of Conflict of Laws in *rationalizing* the results obtained by the courts in decided cases."⁶⁶ Using the "grouping" approach, the court again found that Illinois law should be applied; and, since under Illinois law the judgment

⁶¹ *Auten v. Auten*, *supra* note 56.

⁶² See, e.g., *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953); In the Matter of Estate of Bulova, *supra* note 56, at 256, 220 N.Y.S.2d at 547. Note the mention of this rationalization in *Auten v. Auten*, *supra* note 56, at 160, 124 N.E.2d at 102.

⁶³ 305 N.Y. 288, 113 N.E.2d 424 (1953).

⁶⁴ *Id.* at 305, 113 N.E.2d at 431.

⁶⁵ 223 Ind. 570, 63 N.E.2d 417 (1945).

⁶⁶ *Id.* at 585-86, 63 N.E.2d at 423 (emphasis added).

taken there was valid, the Indiana court held that it was entitled to full faith and credit. This case was noted by Professor Fowler Harper in support of his view that the courts were not really concerned with the intent of the parties, but actually were dictated by a *policy* factor which called for adoption of the law of that state having the "most intimate connections with the factual context of the legal problem."⁶⁷ However, it seems that the New York courts are genuinely concerned with intent,⁶⁸ and, backed by the new proposals of the *Restatement*, they may no longer feel the need to "justify" their decisions.

One final and slightly different aspect of presumed intent needs mention at this time. There are those who agree that where no intent is expressed, the courts are searching for a presumed intent,⁶⁹ but who feel that the grouping of contacts is not the proper means of ascertaining it.⁷⁰ Instead, they take a more liberal view which Professor Albert Ehrenzweig has called his "rule of validation."⁷¹ It is based upon the belief that parties entering into a contract upon equal terms⁷² want their agreement

⁶⁷ Harper, *Policy Bases of the Conflict of Laws: Reflections on Re-reading Professor Lorenzen's Essays*, 56 YALE L.J. 1155, 1164-66 (1947).

⁶⁸ See *Auten v. Auten*, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954); *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 26, 198 N.E. 617, 618 (1935); *Wilson v. Lewiston Mill Co.*, 150 N.Y. 314, 323, 44 N.E. 959, 961-62 (1896). Doubt may sometimes arise as to this concern for intent when New York courts make such statements as "the execution, interpretation and validity of a contract is determined by the law of the place where the contract is made." *Employers' Liability Assur. Corp. v. Aresty*, 11 App. Div. 2d 331, 333, 205 N.Y.S.2d 711, 714 (1st Dep't 1960). See 27 BROOKLYN L. REV. 331, 334 (1961), where it is stated that the court was applying the "traditional conflict of laws tests." However, careful reading of the cases usually can uncover a preoccupation with the "intent" concept. Thus, the court in the *Employers' Liability* case went on to observe that when the contract was executed "the parties intended the measure of their obligation thereunder to be determined by New York law." *Employers' Liability Assur. Co. v. Aresty*, *supra* at 333, 205 N.Y.S.2d at 714.

⁶⁹ See Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 992, 1000-02 (1959).

⁷⁰ Professor Ehrenzweig has described the center of gravity theory as nothing "more than an admission of defeat. Like its English model, the 'proper law' theory, it merely states a conclusion and offers little in the way of guidance. . . ." *Id.* at 985; see Weintraub, *The Contract Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 724 (1961).

⁷¹ Ehrenzweig, *supra* note 69, at 974.

⁷² Professor Ehrenzweig excludes adhesion contracts from his rule of validation. In such contracts the parties are not really in equal bargaining positions. Instead an entrepreneur makes use of an already prepared agreement which the customer often agrees to without any discussion of his relative rights and duties thereunder. Ehrenzweig, *supra* note 69, at 976-77.

to be binding upon them and the conflict rules should assist them whenever it can.⁷³ In other words, the courts, with certain exceptions and restrictions,⁷⁴ will apply the law which will make the contract valid, because presumably when parties enter into an agreement, they intend to enter into a valid, binding one.⁷⁵ While welcoming the freedom from the rigidity of the old *Re-statement* which the new proposals bring, the proponents of the validation theory feel that there is still much to be desired.⁷⁶

That intent plays such a valid role in the make-up of the new proposals is symbolic of the growth and change that have occurred in the country's view of conflict of laws during the past several decades. Now the validity of contracts, except in usury cases,⁷⁷ is to be determined by the local law⁷⁸ of the state with which the contract has its most significant relationship—and the state of most significant relationship is the state *chosen by the parties*.⁷⁹ No longer are contracts looked upon as creations of territorial sovereigns; now the individuals themselves create them.⁸⁰ Yet, in expressly choosing for themselves what law is to govern their agreement, the parties are kept within reasonable bounds: (1) the choice must not be obtained unfairly or by mistake;⁸¹ (2) there has to be some substantial relationship with the state chosen;⁸²

⁷³ Ehrenzweig, *supra* note 69, at 988.

⁷⁴ See generally Ehrenzweig, *supra* note 69, at 1011-24.

⁷⁵ Ehrenzweig, *supra* note 69, at 992.

⁷⁶ See Weintraub, *supra* note 70, at 730.

⁷⁷ The new proposals provide that a contract will be protected against a charge of usury if it is valid under the usury law of *any* state with which it has a substantial relationship provided that the rate of interest is not greatly in excess of the amount permitted by the law of the place which would have normally supplied the governing law. RESTATEMENT (SECOND), CONFLICT OF LAWS § 334d (Tent. Draft No. 6, 1960). Compare this with Ehrenzweig's validation theory which is discussed in the text accompanying notes 71-75 *supra*.

⁷⁸ Note the reference is to the local law and not to the totality of law which would include the conflict of laws rules. RESTATEMENT (SECOND), *supra* note 77, § 332, comment *e*.

⁷⁹ RESTATEMENT (SECOND), *supra* note 77, § 332(2).

⁸⁰ See Yntema, *Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States*, 1 N.Y.L.F. 46, 65 (1955).

⁸¹ This is the ordinary contractual requirement that there must be a meeting of the minds. In the case of *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957), the court was confronted with a contractual provision which declared the law of the United States to be the governing law. However, the court resorted to a grouping of the contacts because (1) the provision appeared in a unilaterally prepared steamship ticket; and (2) the provision was written in English and the plaintiff was a German national, entirely nonconversant with the English language. Thus, there was no indication that the parties had "agreed" upon the governing law.

⁸² See Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899, 919 (1938). But see Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 990 (1959).

and, (3) application of the chosen law cannot violate the fundamental policy of the state whose law would govern if no choice had been made.⁸³ Where the choice of law is ineffective, or where the parties simply have not selected a governing law, attention is focused on the "events" of the contract. So when the place of contracting and the place of performance are in the same state, that state's local law will govern.⁸⁴ It is only when these two events, *i. e.*, making and performance, are divided, or when the place of performance is uncertain, that the courts begin to "group the contacts."⁸⁵ The grouping is done simply to find the place of most significant relationship; wisely, no attempt is made to categorize it as anything else.⁸⁶ The entire second section of the new rules deals with specific types of contracts in which particular contacts are given more important roles than others in the determination of the governing law.⁸⁷ But, again, the contacts are considered only when the parties have failed to make an effective choice of law of their own.⁸⁸

⁸³ The "policy" referred to in this section must be of considerable importance before it is deemed "fundamental." But it need not be as strong as the policy which is required to justify the *forum* in refusing to entertain suit upon a foreign cause of action. See RESTATEMENT (SECOND), *supra* note 77, § 332(a), comment *g*; cf. Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 920 (1942), where the author declares it to be "a sound limitation of the intent theory" that the provisions of the law agreed upon must not conflict with the law or public policy of the state in which the contract is made.

⁸⁴ RESTATEMENT (SECOND), *supra* note 77, § 332b.

⁸⁵ RESTATEMENT (SECOND), *supra* note 77, § 332b, comment *b*. Among the factors or contacts to be considered generally are: place of contracting, place of performance, domicile of the parties, etc. Significantly, the law under which the contract will be most effective is also to be considered.

⁸⁶ The cases cited in the reporter's note to the grouping of contacts section RESTATEMENT (SECOND), *supra* note 77, § 332b, reporter's note at 35-38, resorted to grouping for various reasons: Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946) (to best accommodate the equities among the parties to the policies of those states); Pritchard v. Norton, 106 U.S. 124 (1882) (to uphold the contract); Jansson v. Swedish Am. Line, 185 F.2d 212 (1st Cir. 1950) (to accord with the presumed intent of the parties); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954) (to apply the policy of the jurisdiction most intimately concerned with the litigation and to give effect to the presumed intent of the parties). However, the new proposals resort to grouping simply to find the place of most significant relationship.

⁸⁷ For example, in a contract for the sale or lease of interests in immovables, special heed is given the local law of the state where the immovable is situated. RESTATEMENT (SECOND), CONFLICT OF LAWS § 346e (1) (Tent. Draft No. 6, 1960).

⁸⁸ See RESTATEMENT (SECOND), *supra* note 87, Introductory Note § 346e-n, at 89-90.

Summary

Bearing in mind the real purpose of any "restatement" of the law, the remark in the introduction to the new *Restatement* that the new rules "are in accord with what most American cases have done and in accord with what some of them, especially recent ones, have said,"⁸⁹ would be reason enough to approve of them. But they have more to recommend them. Certainty and predictability are obtained without submission to inflexible, precise rules which often were ignored by courts to reach just results. A valid choice by the parties furnishes them with a law which they know will be applied to any disputes that may arise. Therefore, they can engage counsel familiar with that law to aid in drawing up their contract. But the new rules bring certainty to another area: the governing law not only determines factors concerned with substantial validity, capacity and formalities, etc., but also all substantial questions relating to sufficiency of performance, and excuse for nonperformance as well.⁹⁰ It will be recalled that the old *Restatement* provided that sufficiency of performance or excuse for nonperformance was to be governed by the law of the place of performance.⁹¹ Courts frequently were faced with the difficult task of distinguishing matters of obligation from matters of performance to determine which law was to govern.⁹²

The Indiana case of *Egley v. T. B. Bennett & Co.*⁹³ is an ideal example. The parties involved executed a note in Indiana which was payable in Illinois. The note contained a provision which authorized *any* attorney to confess judgment for the maker without service of process or any appearance by the maker. Such a provision would have no validity in Indiana, but was permitted by the law of Illinois. A judgment was obtained in Illinois pursuant to the confession of judgment provision, and the Indiana court, deciding that such a provision related to *performance* rather than formal validity, held that the Illinois judgment was entitled to full faith and credit. The courts find themselves in a similar quandary when they have to separate matters of "substance" from matters of "procedure." The elimination of any necessity for the courts' having to make such a decision would be most significant, since quite often substantial rights are affected by the determination.

⁸⁹ RESTATEMENT (SECOND), *supra* note 87, Introductory Note at 2.

⁹⁰ RESTATEMENT (SECOND), *supra* note 87, § 346a.

⁹¹ RESTATEMENT, CONFLICT OF LAWS § 358 (1934).

⁹² Indeed the old *Restatement* itself noted that there was no "logical line" separating questions of obligation from questions of sufficiency of performance and excuse for nonperformance. *Id.* § 358, comment b.

⁹³ 196 Ind. 50, 145 N.E. 830 (1924).

Some critics find fault with the grouping of contacts provisions.⁹⁴ However, assuming *arguendo* that their attack is valid, they seem to be concerned with a secondary facet of the rules. Parties should not be heard to complain of grouping when they could avoid the problem by expressly designating a governing law in the first place. The new *Restatement* heeds the admonition that sufficient attention be given the social and economic factors involved in contracts.⁹⁵ The entire second section provides special treatment for particular contacts when those contacts are integral to the nature of the contract, *e.g.*, situs of the *res* in a contract involving immovables.

A contract "is a promissory agreement between two or more persons that creates, modifies, or destroys a legal relation."⁹⁶ The proposed *Second Restatement of Conflict of Laws* would finally give this power to create, modify and destroy back to the contracting individuals.

⁹⁴ See Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 984-85 (1959); Weintraub, *The Contract Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 724 (1961). Weintraub describes grouping as a "contact-counting rather than a contact-evaluating rule." But see RESTATEMENT (SECOND), *supra* note 87, § 332b, comment *a* where it is noted that "a smaller number of more significant contacts may outweigh a larger number of less importance."

⁹⁵ See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 417 (1942).

⁹⁶ BLACK, *LAW DICTIONARY* (3d ed. 1933).